Supreme Court, U.S.
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No. 91-1157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

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REPLY BRIEF OF PETITIONER

DEWITT W. CLINTON
S. ROBERT AMBROSE
OWEN L. GALLAGHER
Office of the County Counsel
County of Los Angeles
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1891

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF OF PETITIONER

Desperate to sustain a judgment in excess of $9 million against the County, respondent's 30-page opposition to the County's petition for certiorari (plus 21-page "appendix") offers every conceivable argument against review in this Court—except a defense of the theory of Section 1983 liability on which that judgment was based. Thus, the vast majority of respondent's brief is devoted to non-existent jurisdictional obstacles (Opp. 4-5, 20-21), mischaracterizations of the decision below or of petitioner's argument (*id.* at 6-15), and attempts to sow ambiguity and confusion regarding the factual basis for the judgment (*id.* at 2-4, 21, 23-25). What respondent cannot obscure, however, is that the theory of Section 1983 liability adopted by the court below—which exposes local governments to extraordinary damages awards based upon lawful policy choices—is a matter of recurring significance and is legally indefensible. Despite respondent's legal and logical gymnastics, the fact remains that this case presents three separate and important questions of federal law, each of which is worthy of review by this Court.

STATEMENT OF THE CASE

Respondent takes 51 pages, including extensive quotations from the record, to support his thesis that this case involves nothing more than "fact-bound application of settled law." Opp. 4. However, review of less than two paragraphs of the decision below demonstrates that the judgment under review actually rests upon a series of cleanly presented, although wrongly decided, legal issues:

> [Petitioner] did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here. . . . There being a policy, the question is whether . . . this policy violated plaintiff's federal statutory rights.
>
> The rights at issue are those contained within the Ship Mortgage Act of 1920.

Pet. App. 18a. The questions presented are (1) whether, in the circumstances, the County's facially lawful "policy" may form the basis of municipal liability under 42 U.S.C. § 1983; (2) whether the "rights at issue" are enforceable under Section 1983; and (3) whether the Ship Mortgage Act preempts the application of the "policy" in question to preferred ship mortgages. Pet. i. Respondent's lengthy exposition of the record never demonstrates that this Court's decision of these pure questions of federal law would be dependent, in any way, upon resolution of any factual disputes, and review by this Court accordingly is appropriate.

Moreover, respondent's repeated observation that the decision below was "unpublished" provides no basis for denying review. Indeed, "[n]onpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the [state courts] and surely is as important to the parties concerned as is a published opinion." *Smith* v. *United States*, 112 S. Ct. 667, 669 n.* (1991) (Blackmun, J., dissenting). Review by this Court is necessary in order to ensure that the Court of Appeal's errors are not repeated and that other municipal governments do not become subject to the unwarranted liabilities imposed upon the County in this case. *Cf. City of Canton* v. *Harris*, 489 U.S. 378 (1989) (reviewing unpublished order of Sixth Circuit regarding sweep of Section 1983 liability against municipality).

I.

A. The first question presented is whether the County's ordinarily lawful policy—which recognized self-help repossessions where the relevant party had waived his right to legal process—may give rise to Section 1983 liability where such a policy unforeseeably "conflicts" with respondent's "statutory right" to "procedures set forth in the Ship Mortgage Act." Pet. App. 23a; see *supra* p. 1 (quoting Pet. App. 18a). The County's liability was premised solely on the fact that the County's "policy," as applied in the exceptional circumstances of this case,

was contrary to the court's view of "plaintiff's federal statutory rights"—even though such "rights" had never been enumerated at the time the County acted. Pet. App. 23a; see Opp. 7 (liability based on application of general policy "without making any effort to comply with special federal rules applicable to the property at issue"). As explained in the Petition (Pet. 14-16), such an expansive theory of municipal liability has never been endorsed by this Court and is in fact inconsistent with principles of municipal liability embodied in the prior decisions of this Court and other federal courts.

Respondent offers numerous purported reasons to avoid this issue, none of which withstands serious scrutiny. First, respondent makes the remarkable argument that this federal question was not "timely and properly raised so as to give this Court jurisdiction to review" the state court judgment. Opp. 4-5 (quoting Sup. Ct. R. 14.1 (h)). The notion that a Section 1983 case against a municipality could be fully litigated without the issue of the County's liability under the "*Monell*" standard being raised is pure nonsense; in fact, the majority of the briefing in the courts below was devoted to the "*Monell* issue,"[1] and the issue was discussed at length in the Court of Appeal's opinion. Pet. App. 15a-18a. The jurisdictional requirement in question requires only that a federal claim must have been *either* raised in the state court *or* considered and resolved by the state court. See *Hill* v. *California*, 401 U.S. 797, 805 (1971). Where, as here, the highest state court to decide the case actually resolved the federal questions, there is no obstacle to this Court's review. See *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959).[2]

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[1] *See* Opening Brief of Appellant in the Court of Appeal 19-28; Reply Brief of Appellant 3-12; Supplemental Reply Brief of Appellant 2-6; Petition for Review in the California Supreme Court 12-20.

[2] The notion inherent in respondent's brief that petitioner is limited to the precise phrasing of an argument advanced below is flatly contrary to established precedent. *See Dewey* v. *Des Moines*,

Second, respondent engages in a lengthy and essentially circular dialectic about whether the County's liability was based upon the existence of its general policy or the absence of an exception to that policy (or the training of its Sheriff's Department officers pursuant to that policy or the exceptions thereto). Opp. 6-10. For purposes of this petition, however, it simply does not matter: petitioner, respondent and the court below all agree that "the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. Its policy was to treat all civil repossessions alike." *Id.* at 9; Pet. App. 18a. Thus, it was the County's general policy towards repossessions—and the failure of that policy to make specific provision for the Ship Mortgage Act—that allegedly "violated plaintiff's federal statutory rights." Pet. App. 23a, 18a. Semantics aside (see Opp. 8), the question is not how the County's policy is characterized but whether the imposition of liability under such a policy is consistent with *Monell*'s "fault-based analysis for imposing municipal liability." Pet. 10 (quoting *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985)).

Third, respondent asserts that the focus on the Ship Mortgage Act in the first question presented is misplaced because the "critical defect" in the County's policy was that "it violated due process." Opp. 11; see *id.* at 15 ("the salient norm here is due process, not the Ship Mortgage Act"). This argument flatly misrepresents the record: the *sole* basis for the judgment below was the court's conclusion that there was a violation of "plaintiff's federal statutory rights . . . contained within the Ship Mortgage Act of 1920." Pet. App. 18a. The procedural due process cases relied upon by respondent do

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173 U.S. 193, 198 (1899) (parties before Court "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972) (as long as federal question was properly raised or decided in state court, parties can use a different "method of analysis readily available to the state court").

not even appear in the decisions below, let alone provide any basis to support those judgments.[3]

Moreover, the statement that the County's policy would "obviously violate due process" rests solely on respondent's view of the "salient norm[s]" (Opp. 12, 15) and not on any decision of this Court. Respondent's analysis of the case law (Opp. 11-14) relies largely on cases where there has *not* been any waiver of pre-deprivation process, and the case on which respondent principally relies specifically distinguishes the situation of express contractual waiver. *Fuentes* v. *Shevin*, 407 U.S. 67, 94-96 (1972).[4] Indeed, respondent ultimately concedes that procedural due process rights can be the subject of a waiver (Opp. 13), reducing his argument to the factual assertion that the waiver *in this case* was invalid because it was "the product of extortion." *Id.* That argument (*id.* at 1, 11 n.7), however, rests only upon respondent's willingness to overlook the fact that the parties *stipulated* that "the facts of [the] invalidity were not apparent on the face of the document." Reporter's Transcript 53-54.

B. Once respondent's extravagant effort to avoid the question presented (Opp. 1-15) is put aside, respondent's

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[3] Respondent's citation of seven references to "due process" or "constitutional rights" in the Court of Appeal's opinion is misleading. Opp. 14. Several of these references are no more than factual descriptions of the preferred ship mortgage that the Nicolettis showed to Lieutenant Baca (Pet. App. 10a-11a, 18a, 23a), and another describes the holding in *City of Canton* v. *Harris*, 489 U.S. 378 (1989) (Pet. App. 15a). In no instance did the court below suggest that this case was decided on constitutional due process grounds.

[4] In *Fuentes*, there was no "voluntar[y], intelligent[], and knowing[]" waiver on the face of the contract, which was a contract of adhesion including an ambiguous repossession provision printed in small type. 407 U.S. at 95 (quoting *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 187 (1972)). On its face, the waiver in this case much more nearly resembled the provision in *D.H. Overmyer Co.*, which the Court held could operate as a complete waiver of judicial process, subject only to collateral attack on fraud or similar grounds.

argument against review in this case—which amounts to nothing more than an assertion that the court below was correct—readily can be dismissed. For example, respondent asserts that requiring a finding of "deliberate indifference" would create a "sea of confusion" in the lower courts. *Id.* at 19-20. But that was precisely the standard adopted by this Court in *City of Canton*. As applied in this case, it would merely require a showing (as a basis for County liability) that the need for an "exception" to County policy (for preferred ship mortgages) was so obvious or frequently encountered that the municipality's failure to adopt an exception necessarily shows deliberate indifference to respondent's "rights."[5]

Indeed, the bankruptcy of respondent's "sea of confusion" argument is demonstrated by his suggestion that the facially invalid policy at issue in *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978), is comparable to the policy at issue here because even the *Monell* policy might not lead to "damage actions" in every case in which it was applied. Opp. 18 n.14.[6] There is an obvious difference in kind between the policy in *Monell*, which was generally unconstitutional but occasionally might fortuitously cause no harm, and the policy in this

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[5] Although respondent describes the County's characterization of *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989), as "misleading" (Opp. 17 n.12), he does not contest the fundamental point that the court in *Merritt* did precisely what the County believes should have been done here: it asked whether the County's failure to adopt an exception to its ordinarily lawful policy could be characterized as deliberately indifferent, and on finding that it could not, held in favor of the County as a matter of law.

[6] Respondent misunderstands the County's citation of *Owen* v. *City of Independence*, 445 U.S. 622 (1980), and *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), as additional cases in which the Court addressed a policy that "necessarily entailed a violation of federal rights in every situation to which it applied." Pet. 14. In both *Owen* and *Pembaur*, a *policymaker* had made a case-by-case decision, and the facts before the Court were therefore the only "situation to which [the decision] applied." Under such circumstances, there is obviously no question that the policymaker deliberately intended the policy to reach the relevant facts.

case, which was generally lawful and appropriate.[7] At bottom, all that respondent is able to suggest is that there may be cases in which the question of deliberate indifference is a close one, but that does not render the question presented unworthy of review.[8]

II.

The second question presented is whether the Ship Mortgage Act preempts state law in a fashion that confers upon respondent a federal right actionable under Section 1983. See Pet. i; *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 105-06 (1989). Once again, respondent relies upon his alternative "due process" argument, among others, to avoid addressing whether this issue is worthy of review. Opp. 20-21; see *supra* pp. 4-5.[9] Failing that, respondent simply argues that he is correct "on the merits." *Id.* at 21.[10] Respond-

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[7] The County does not maintain "that only policies unconstitutional in all their applications may give rise to Section 1983 liability." Opp. 19 n.14. Rather, the point is that policies that are *lawful* in *most* applications should not give rise to liability in the exceptional case absent deliberate indifference.

[8] There is no merit to respondent's suggestion that the Court of Appeal found in the alternative that the County was deliberately indifferent in this case. Opp. 20 n.15. In the passage quoted by respondent, the Court of Appeal was merely stating theories on which, if supported by the facts, liability might hypothetically be grounded, and not laying out the basis for any actual holding. *See* Pet. App. 17a-18a.

[9] Respondent's most remarkable argument is that certiorari should be denied on the ground that this case "would be a poor vehicle" for addressing the question presented because the preferred ship mortgage in question was invalid. Opp. 21. Respondent, of course, has had a verdict in excess of $9 million entered in his favor solely on the basis of his "rights" as a mortgagor under a preferred ship mortgage. To suggest that he should now escape review of that verdict on the ground that the mortgage was "not really such a mortgage at all" (*id.*) is an argument that should make respondent blush.

[10] Respondent rests primarily on the unsupported assertion that the Ship Mortgage Act was "not an effort to protect investors [but]

ent offers no legitimate suggestion why this Court should not review this question or, at the very least, withhold decision on the petition in order to determine if it is appropriate to vacate the judgment below and remand for further consideration in light of *Suter* v. *Artist M.*, No. 90-1488 (oral argument Dec. 2, 1991).

III.

The third question presented is whether the Ship Mortgage Act preempts state enforcement of contractual provisions for self-help foreclosure of preferred ship mortgages. Respondent again offers a number of arguments why this issue need not be reached. First, respondent points to the 1988 recodification of the Ship Mortgage Act to suggest that the decision below is lacking in precedential value. Opp. 23 n.16. However, none of the amendments that respondent cites in any way affected the Act's provision of an exclusive federal forum for judicial foreclosure of preferred ship mortgages—the sole basis of respondent's preemption argument. Second, respondent warns that reaching the preemption question will cause this Court to become embroiled in difficult questions of California law. *Id.* at 24-25. California law, however, has no bearing on this case. Section 1983 provides a remedy only for violations of *federal* rights; even if state law were to protect mortgagors from self-help repossession, such protection could not be the basis for a Section 1983 claim.

On the merits, respondent makes only a convoluted argument that preemption of self-help provisions is consistent with the Congressional purpose to protect mortgagees because one mortgagee's exercise of self-help may prejudice the interests of another creditor. *Id.* at 26-27.[11]

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primarily a move to benefit mortgagors." Opp. 22. This assertion is flatly contradicated by the holdings of this and other courts. *See* Pet. 21-22.

[11] In addition, respondent incorrectly asserts that the only case supporting petitioner's position is *Brown* v. *Baker*, 688 P.2d 943

Obviously, however, a dispute regarding the merits provides no reason to deny review in this Court when there is a conflict among State Supreme Courts on a basic issue of federal law. Moreover, there is no evidence that Congress intended through the Ship Mortgage Act to do more than ensure the availability to ship mortgagees of a uniform foreclosure procedure similar to that available to holders of secured interests in other property.[12]

* * * * *

No amount of revisionist argument on respondent's part can change the fact that the judgment below is premised on an extraordinarily expansive view of local government obligations under Section 1983. Because of the importance and recurring nature of the federal questions presented and because of the conflicts among the federal and state courts over the proper resolution of those questions, review by this Court clearly is warranted.

(Alaska 1984). Opp. 28. In fact, although *Brown* is the only State Supreme Court decision to have held that the Ship Mortgage Act does not preempt contractual self-help repossessions, at least two federal district courts have reached the same conclusion. *Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114-17 (S.D. Fla. 1988); *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1569-70 (W.D. Wash. 1983); *see also Challenger, Inc.* v. *Durno*, 227 F.2d 918, 919 n.1, 922 (5th Cir. 1955) (assuming validity of contractual provision for self-help foreclosure as basis for decision). All three of these cases were cited at page 20, note 18 of the Petition for Certiorari, and these decisions, in addition to *Brown*, persuasively counterbalance the two decisions that, according to respondent, constitute the "weight of authority" in support of his position. Opp. 28. In any event, the conflict in itself warrants review by this Court.

[12] Respondent also asserts that the Ship Mortgage Act "expressly" preempts contractual self-help remedies, citing in support of this position only the disputed language conferring exclusive federal jurisdiction over *judicial* foreclosures. Opp. 26 n.20.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

DEWITT W. CLINTON
S. ROBERT AMBROSE
OWEN L. GALLAGHER
Office of the County Counsel
County of Los Angeles
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1891

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
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